

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

In re Special Proceedings

Misc. 01-47T

MEMORANDUM AND ORDER

ERNEST C. TORRES, Chief United States District Judge.

James Taricani has filed a motion to stay this Court's order of October 2, 2003, (the "October 2 Order") which directs him to answer questions posed during the course of a criminal investigation being conducted by a Special Prosecutor.¹ The questions seek to identify the person who provided Taricani with a video tape in apparent violation of a court order (the "Protective Order") that prohibited counsel in a criminal case from disseminating that tape. For the reasons hereinafter stated, the motion to stay is denied.

Background

The background facts and the reasons for the order directing Taricani to answer the Special Prosecutor's questions are fully explained in this Court's October 2 Memorandum and Order. In re Special Proceedings, Misc. No. 01-47T, 2003 WL 22284124 at *1-*2 (D.R.I. October 2, 2003). For present purposes it is sufficient

¹The motion also was purportedly filed on behalf of Outlet Broadcasting, Inc., d/b/a WJAR-TV, Channel 10. However, Outlet Broadcasting is not a party to this proceeding.

to state that, in May 1999 and June 2000, a grand jury indicted several officials of the City of Providence for extortion, bribery, and various other offenses. Those indictments generated intense publicity and considerable speculation as to whether the mayor also was involved. The speculation was fueled by a series of leaks regarding evidence that had been presented to a grand jury that still was investigating the matter.

The judge presiding over the cases at that time entered a Protective Order prohibiting participants in the cases from disseminating surveillance tapes that had been made by law enforcement officials and had been furnished to counsel during discovery. The purposes of that order were to avoid compromising the on-going investigation being conducted by the grand jury to which the tapes were being shown and to protect the indicted defendants' right to a fair trial.

Despite the Protective Order, one of the tapes was given to Taricani who aired it on Channel 10. This Court, then, appointed a Special Prosecutor to determine whether charges of criminal contempt should be brought against the individual(s) responsible for providing the tape to Taricani.

It should be noted that Taricani, himself, is not a target of the Special Prosecutor's investigation because the Protective Order was directed only at participants in the criminal cases

and does not purport to prohibit the media from doing anything. Taricani has become the object of attention in this proceeding only because he is a material witness and he has refused, based on what he contends is a "newsman's privilege," to identify the individual(s) who apparently violated the Protective Order.

Taricani has appealed from the October 2 Order and seeks a stay of that order pending resolution of his appeal. The sole argument made in support of the motion to stay is that "[t]he appeal raises issues of constitutional import that justify a stay" and that, unless a stay is granted, "Mr. Taricani must choose between risking an order of contempt or abandoning the assertion of a constitutionally-based privilege." Taricani's Mem. of Law in Supp. of Motion to Stay, at 2.

Analysis

It is well established that, in order to obtain a stay pending appeal, the party seeking the stay must demonstrate four things: "a strong likelihood of success on the merits of its appeal; that he will suffer irreparable harm if a stay is not granted; that the harm will outweigh any harm opposing parties will suffer if a stay is granted; and that the public interest would be furthered by the granting of a stay." In re Power Recovery Sys., Inc., 950 F.2d 798, 804 n.31 (1st Cir. 1991). Moreover, "failure to meet even one of the criteria justifies

denial." Id.

Here, Taricani has failed to satisfy at least two of the four requirements. He does not even argue that there is a strong likelihood that he will succeed on appeal and this Court sees no basis for concluding that he will. On the contrary, as this Court noted in the October 2 Order, the Supreme Court has expressly rejected the contention that reporters have a First Amendment privilege to refuse to "respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial." In re Special Proceedings, 2003 WL 22284124 at *5 (quoting Branzburg v. Hayes, 408 U.S. 665, 690-91 (1972)). This Court also applied the balancing test prescribed by the First Circuit in Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980), and its progeny in order to determine whether the lesser degree of First Amendment protection afforded to a journalist's "confidential sources" excuses Taricani from any obligation to answer questions regarding the identity of the person who provided the tape to him. In applying that test, this Court found that the scale "decisively" tipped in favor of requiring Taricani to answer the Special Prosecutor's questions. In re Special Proceedings, 2003 WL 22284124 at *15.

With respect to the public interest prong of the test, this

Court, already, has found that "the strong public interest in seeing that court orders are enforced and that criminal acts that threaten to compromise grand jury investigations and to deprive defendants of their constitutional right to a fair trial are punished . . . greatly outweigh the relatively modest impact that disclosure [of Taricani's source] might have on the free flow of information and/or any interest that the public may have in obtaining a preview of evidence likely to be presented at a criminal trial." Id.

Balancing any irreparable harm that Taricani may suffer if a stay is not granted against any harm that the public, whose interest the Special Prosecutor serves, will suffer if a stay is granted is a more formidable task. If the motion for a stay is denied, Taricani will have to choose between answering the Special Prosecutor's questions thereby relinquishing his claim of privilege; or, alternatively, persisting in his refusal to answer thereby risking a contempt citation. Without knowing which alternative Taricani may choose, it is difficult to determine whether Taricani will be irreparably harmed if his motion for a stay is denied. Even if the prospect of a contempt sanction induces him to answer the Special Prosecutor's questions, it is at least debatable whether providing the information requested in this particular case would irreparably

harm Taricani or, for that matter, anyone else besides the individual(s) who apparently violated the Protective Order. If Taricani prevails, on appeal, the privilege that he asserts will be established and his concern that fear of being identified will deter individuals who participate in or abet criminal acts from, in the future, providing information to reporters will be allayed.

More importantly, it does not appear that any harm that Taricani might suffer outweighs the harm that would be suffered by the public if a stay is granted. In addition to having a strong interest in seeing that criminal acts are punished, the public has a strong interest in seeing that the alleged perpetrators are prosecuted expeditiously and before witnesses or other evidence become unavailable. Here, the investigation already has been delayed by the Special Prosecutor's efforts to first question other potential witnesses in an attempt to obtain the evidence necessary to complete his task without having to ask Taricani to identify his source. Granting a stay will further delay the investigation and heighten the risk that any new evidence uncovered as a result of questioning Taricani may no longer be available. Nor is there any assurance that, if a stay is granted, Taricani will answer the Special Prosecutor's questions should his appeal be unsuccessful.

In any event, even assuming, arguendo, that the harm to Taricani if a stay is denied would outweigh the harm to the public if a stay is granted, the magnitude of the difference between the relative harms is not sufficient to overcome Taricani's failure to satisfy the other two requirements for obtaining a stay. As already noted, Taricani has failed to demonstrate a likelihood of success on the merits of his appeal. Moreover, the dominant public interest, here, is in seeing that court orders are enforced and that criminal acts that threaten to compromise grand jury investigations and to deprive defendants of their constitutional right to a fair trial are punished.

Conclusion

For all of the foregoing reasons, Taricani's motion for a stay pending resolution of his appeal from the October 2 Order is hereby denied, but the October 2 Order is stayed for thirty days in order to afford Taricani an opportunity to seek such a stay from the Court of Appeals.

IT IS SO ORDERED,

Ernest C. Torres, Chief Judge
Date: December , 2003